

Date: May 9, 2016

To: Children, Families, Interim Committee

Re: National Guardianship Association Standards and Montana law

Given that the NGA standards are well-regarded and many of the provisions in the standards are absent in Montana law, there is good reason to consider incorporating at least some of the standards into current law. The following is an example of the manner in which the substantive standards could be placed into current law:

72-5-321. Powers and duties of guardian of incapacitated person.

...

(2)(a) . . . the full guardian is entitled to the custody of the person of the ward and may establish the ward's place of residence within or outside of this state. The guardian shall evaluate the housing alternatives that are available and choose the one that is the most appropriate environment that addresses the ward's goals, needs and preferences. The guardian shall have a strong preference for home or other community-based settings, when not inconsistent with the ward's goals and preferences. The guardian shall authorize moving a ward to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, fulfills the current needs of the person and serves the overall best interest of the ward. When the guardian considers involuntary or long-term placement of the person in an institutional setting, the bases of the decision shall be to minimize the risk of substantial harm to the person, to obtain the most appropriate placement possible and to secure the best treatment for the person. . . .

(2)(e) . . . A full guardian is required to report the condition of the ward and of the estate which has been subject to the full guardian's possession and control annually for the preceding year. This shall include any personal care plans or financial plans, inventories, appraisals, reports and accountings that have been compiled.

NEW PROVISIONS: still in 72-5-321

(7) A full or limited guardian shall treat the person under guardianship with dignity. The guardian shall keep the affairs of the ward confidential and shall only disclose information when it is necessary for the best interests of the ward. The guardian may only disclose information that is necessary and relevant to the issue being addressed.

(8) A full or limited guardian shall promptly inform the court of any change in the capacity of the person that warrants an expansion or restriction of the guardian's authority. If the change warrants a restriction of the guardian's authority, the guardian shall petition to limit or terminate

the guardianship.

(9) A full or limited guardian shall promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship. The guardian shall encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person. The guardians shall not interfere with established relationships unless necessary to protect the person from substantial harm.

(10) A full or limited guardian shall provide the ward with every opportunity to exercise the individual rights that the person might be capable of exercising as they related to the ward's personal care and financial needs. They shall encourage the ward to participate, to the maximum extent of the person's abilities, in all decisions that affect him or her, to act on his or her own behalf on all matters in which the person is able to do so, and to develop or regain his or her own capacity to the maximum extent possible.

(11) A full or limited guardian shall meet with the ward as soon after the appointment of the guardian as possible. The guardian shall communicate the role of the guardian, the rights retained by the ward, assess the ward's condition and attempt to gather any missing necessary information regarding the ward.

(12) A full or limited guardian may not authorize extraordinary procedures without prior authorization from the court unless the person has executed a durable power of attorney that clearly indicates the person's desire with respect to that action. Extraordinary procedures may include, but are not limited to, the following medical interventions:

- a. psychosurgery
- b. experimental treatment
- c. sterilization
- d. electroshock therapy

March 9, 2016

To the Members of the Interim Committee on Children, Families, Health and Human Services:

The following is a list of concerns about Montana's guardianship and conservatorship laws. They have been collected from our experience with clients, information from Montana judges and input from disability advocates from throughout the country. This is probably not an exhaustive list, but it includes many of the more serious issues with the Montana statutory law.

The law does NOT provide:

1. Automatic triggers for reexamination of the guardianship or conservatorship if certain issues arise, such as when a guardian consistently fails to provide an annual report, files inadequate reports, or when there is an allegation of abuse or neglect.
2. A requirement that all conservators have a bond. Guardianships are typically used to cover situations where the ward has limited income and financial resources. Conservators are usually appointed when there are substantial funds to manage. Given this, conservators should be required to have a bond in every case.
3. A guarantee of appointment of counsel if the ward is indigent. The current statute provides that the judge may appoint counsel if it is in the "interest of justice." Mont. Code Ann. § 72-5-315 (2). Given that these proceedings are some of the most restrictive of a person's constitutional rights, all indigent people must be appointed counsel.
4. A requirement of a full fact finding for each infringement of rights. For example, the ward may not be capable of making financial decisions, but can still make decisions about where they want to live, who they want to spend time with or exercise the right to vote.  
If the court does not find sufficient facts for each infringement of rights in a full guardianship, the guardianship should be limited to those areas only.
5. A requirement that anyone seeking full guardianship demonstrate that it is necessary by clear and convincing evidence, as opposed to a preponderance of evidence. Clear and convincing evidence is a higher civil standard which is closer to a criminal standard and used for situations where constitutional rights are implicated, such as involuntary psychiatric civil commitments.
6. A requirement that anyone seeking guardianship provide a statement of the alternative means tried with the person including powers of attorney, social security benefits payee,

joint accounts, advance directives, trusts, etc., what has been considered or implemented and why those things are inadequate.

7. A requirement that a court granting a full guardianship find by clear and convincing evidence that other alternatives to full guardianship, including a limited guardianship, have been fully explored and are inadequate.
8. A requirement of mandatory standards of practice for guardians/conservators.
9. A requirement of education and training for guardians/conservators.
10. Background checks for guardians/conservators.
11. A means by which a ward can complain or raise concerns regarding the guardian or guardianship relationship to the court, including living arrangements, visitation, retaliation by the guardian, conflicts of interest between the guardian and service providers, or violations of the ward's rights.
12. Appointment of counsel for an indigent ward who is challenging a guardian or conservator for cause or because the ward no longer needs a guardian or conservator.

Although there is a provision for appointment of counsel for "in the interest of justice" for the initial guardianship proceeding, there is no such provision when a guardian or conservator has already been appointed and the ward (or others) believe he or she is either doing a poor job or the ward believes he or she no longer needs a guardian/conservator. Indigent wards need to have access to have counsel to regain their rights in these situations or to have an appropriate guardian to replace the current one.

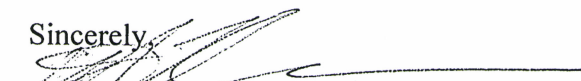
13. Court oversight aside from the filing of annual reports, which most district court judges do not have the staff time or resources to adequately review and analyze.

Our law provides for a visitor to be appointed to assess the potential ward and potential guardian and give a report to the court. Some jurisdictions keep the visitor involved to review the annual reports that are submitted and, if necessary, investigate what is occurring with the ward. That could be a solution in Montana.

14. A requirement that the ward and any interested person receive the annual reports that the guardians/conservators submit to the court.
15. A requirement that the guardian give preference to the housing, health care and other important choices of the ward.
16. Alternatives to guardianship like supported decision making, which is a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions. Supported decision making is gaining popularity and being discussed by the Uniform Law Commission in drafting the new uniform guardianship law, and was

incorporated into Texas statute in 2015. *See Tex. Est. Code* 1357.002 - 1357.003.

Sincerely,



Beth Brenneman  
Staff Attorney

## Boulder Resident Honored for Role in Investigation, Conviction of Bozeman Embezzler

This afternoon at a ceremony in Boulder's Law Enforcement Center, Division of Criminal Investigation Administrator Bryan Lockerby from the Montana Department of Justice presented a plaque to Boulder-area resident Helen Carey to honor her for her role in bringing Bozeman resident Bill Wise to justice. Wise was sentenced to federal prison in 2014 for stealing money from elderly and disabled individuals through his former business, Walking Cross.

Carey, now 77, was the personal representative for the estate of retired teacher Audrey Reese, who died in 2011. After Reese's death, Wise refused to provide Carey with Reese's financial records, so Carey obtained them from Reese's banks. When she discovered that a number of checks written on the accounts seemed inconsistent, Carey reported the matter to law enforcement. An investigation revealed that Wise had stolen more than \$87,000 from Reese, and a total of \$369,000 from 35 other victims.

Attorney General Tim Fox said of Carey, "It's important to note that Helen was not an heir to the estate and did not receive any benefits from it. It would have been easy for her to have walked away from the estate after finding that the money was mostly gone and to have let the chips fall where they may, but she didn't. Because of Helen Carey's actions, Walking Cross was put out of business, dozens of elderly or disabled Montanans whose money was stolen between 2007 to 2011 now have the opportunity for restitution, and no additional victims suffered a loss from Mr. Wise's actions."

DCI Administrator Bryan Lockerby said, "We could assume that Wise would have eventually been caught stealing from some of our most vulnerable citizens, but in the meantime, he continued to take money from people, even after we searched his business in 2011. Eventually, we agreed to work the case through the federal system with agents from Social Security, the Veteran's Administration and the FBI. Mr. Wise decided to cooperate with the investigation and we had a positive outcome in this case."

Over the course of three years, Carey called DCI about every six weeks to find out where the case was in the investigation and prosecution phases. Additionally, she arranged interviews with Ms. Reese's family members for DCI during the early part of the investigation, provided additional information when requested, and drove to Missoula for the sentencing.

Attorney General Fox added, "This serves as a good reminder that it's imperative to plan carefully when choosing your estate executor. While it's important for your personal representative to know you well enough to carry out your wishes after you're gone, this individual should also be prepared to handle any conflicts that arise during the process. Audrey Reese obviously chose very wisely when she selected Helen Carey to represent her estate."

When presenting the plaque to Ms. Carey, DCI Administrator Bryan Lockerby said, "Helen might be small in stature, but she stood tall in this investigation and merits the recognition we're giving her today. It's important to recognize the efforts of our citizens who go above and beyond what the average person does to attempt to hold people accountable for their actions. In this case, it also served to protect a significant number of the most vulnerable of Montana's citizens."

Wise was sentenced in August 2014 to 30 months in federal prison and ordered to pay the entire amount he embezzled from his victims, \$369,582.

The Bozeman Police Department and the Gallatin County Sheriff's Office were also involved in the early stages of the case.